

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

11 GEORGE RICHARD SHIU, ) 1:03-CV-05202 LJO JMD HC  
12 Petitioner, )  
13 v. ) FINDINGS AND RECOMMENDATION  
14 ) REGARDING PETITION FOR WRIT OF  
15 ) HABEAS CORPUS  
16 EDWARD S. ALAMEIDA, et al., )  
17 Respondents. )  
18 \_\_\_\_\_ )

Petitioner is currently on parole and is proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

## BACKGROUND

Petitioner is currently on parole after his confinement at Avenal State Prison by virtue of a judgment of the Superior Court of California, County of Kern, following his conviction by jury trial on January 26, 2000, of rape with a foreign object (Cal. Penal Code § 289(d)). (Answer, Ex. 1.) On March 8, 2000, Petitioner received a sentence of three years. (*Id.*)

On July 18, 2000, Petitioner filed an appeal to the California Court of Appeals, Fifth Appellate District (hereinafter “Fifth DCA”). (Answer, Ex. 2.) On December 10, 2001, the Fifth DCA affirmed the judgment in a reasoned opinion. (Answer, Ex. 3.)

On January 9, 2002, Petitioner filed a petition for review in the California Supreme Court.

1 (Petition, Ex. C.) On February 27, 2002, the Court denied the petition. (Petition, Ex. D.)

2 On February 14, 2003, Petitioner filed the instant petition in this Court. The petition presents  
3 the following three grounds for relief: 1) insufficient evidence to support the conviction for rape with  
4 a foreign object based on fraud in fact; 2) improper jury instruction on changed intent; and 3)  
5 violation of the Sixth and Fourteenth Amendments, as Petitioner was not allowed to cross-examine  
6 his accuser regarding the amount of civil damages being sought against him.

7 On June 16, 2003, Respondent filed an answer to the petition.

8 On July 1, 2003, Petitioner filed a traverse to the answer.

#### 9 **FACTUAL BACKGROUND<sup>1</sup>**

10 Ms. C. regularly received medical care from Petitioner at the Valley Family Care Medical  
11 Clinic in the City of Taft. Petitioner had conducted pelvic examinations on her prior to December  
12 1997 that included the insertion of his fingers into her vaginal cavity.

13 On December 1, 1997, Ms. C. visited the clinic complaining of abdominal pain. She made  
14 an appointment to return on Wednesday, December 3 for a pelvic examination and testing. On  
15 December 3, Ms. C. arrived at the clinic for the appointment and was shown into examination room  
16 4 by Joanna Gunter, the clinic's medical assistant. Ms. C. was asked to disrobe and she was given a  
17 gown and drape. She was the only patient examined in room 4 on December 3 and Ms. Gunter had  
18 thoroughly cleaned the room the prior day.

19 Ms. C. climbed the step adjoining the examination table and sat on the table wearing only the  
20 gown and her socks. Petitioner entered the room alone and closed the door. He asked Ms. C. to put  
21 her feet in the stirrups attached to the table and to slide her buttocks down to the end of the table.  
22 Her legs were spread apart and the drape was over her knees. Consequently, she could only see  
23 Petitioner from the breastbone upwards.

24 Petitioner began to push on Ms. C.'s abdomen asking her where it hurt. She had covered her  
25 eyes with her hands. At approximately the same time he touched the area that was painful, Ms. C.  
26 felt something penetrate her vagina. It felt smooth, hard, and small. She was unsure what had been

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28 <sup>1</sup>The facts, unless otherwise noted, are derived from the factual summary set forth by the Fifth DCA in its opinion  
of December 10, 2001, and are presumed correct. 28 U.S.C. §§ 2254(d)(2), (e)(1); see Answer, Ex. 3.

1 inserted. She then felt material brush against her inner leg. She uncovered her eyes and looked up at  
2 Petitioner who appeared taller than normal and was moving the way men move when they have  
3 sexual intercourse. She realized that it was Petitioner's penis inside her. It was moving with a  
4 thrusting motion. She was certain that it was not Petitioner's fingers or a speculum. Petitioner  
5 withdrew the object from her vagina and she heard the sound of a zipper.

6 Petitioner called for Ms. Gunter to come and assist him. When Ms. Gunter entered, she was  
7 surprised to see Ms. C.'s feet were already in stirrups with her genitalia exposed. Ms. Gunter had  
8 never before entered an examination room and found a patient in this position. A plastic speculum  
9 had been inserted into Ms. C.'s vaginal cavity without an attached light source which was also  
10 unusual. Petitioner then performed a hurried and rough digital examination. Ms. Gunter had never  
11 seen Petitioner conduct a pelvic examination in such a manner.

12 After the examination, Ms. Gunter began rolling up the used materials that had been placed  
13 on a blue plastic paper liner (the roll-up). Petitioner took off his gloves and threw them on the roll-  
14 up, which was unusual as he normally tossed his gloves directly into the wastebasket. After  
15 Petitioner and Ms. Gunter left, Ms. C. used a tissue to wipe her genitalia and tossed it into the  
16 wastebasket. She noticed three drops of a white substance on the step at the foot of the examination  
17 table which she thought was semen.

18 Ms. Gunter put the roll-up in the biohazard bin located in the laundry area. There were no  
19 paper towels in the roll-up when she put it in the bin. She then went back and tidied examination  
20 room 4. She noticed a large wet spot on the paper covering the examination table. She threw the  
21 cover in the wastebasket.

22 When Ms. C. arrived home, she spoke with her mother and boyfriend about the incident. She  
23 told her mother that she was not certain what Petitioner had placed inside her because she did not see  
24 it, but that it felt like his penis. Ms. C.'s boyfriend immediately called the police.

25 Ms. C. was interviewed and taken to Kern Medical Center where Frances Harris, a registered  
26 sexual assault nurse examiner, conducted a physical examination and interview. Swabs were taken  
27 from the inside and outer edges of Ms. C.'s vagina. Ms. C. told Ms. Harris that it felt like Petitioner  
28 had inserted his penis into her but that she was not positive. Ms. C. was certain that she had not been

1 penetrated with a speculum. Consequently, Ms. Harris, in a form documenting the discussion,  
2 checked the box "unsure" next to penis and finger.

3       Later that evening, Criminalists Tammy Trovato-Noe and Jeanne Spencer went to the Taft  
4 clinic to take evidence. They discovered three discolored spots on the rubberized portion of the  
5 pullout step of the examination table. They also detected a spot on the floor and a stain running  
6 down the end of the examination table. They removed some tissues from the wastebasket and a roll-  
7 up from the biohazard bin. Inside the roll-up were a pair of latex gloves, a speculum, and some  
8 crumpled paper towels.

9       On the following morning, Lieutenant Hodgson interviewed Petitioner. During the interview,  
10 Petitioner stated that he had masturbated in his office after he finished examining Ms. C. He  
11 ejaculated into some paper towels. He might have brought the towels into examination room 4 and  
12 some of the semen could have dripped.

13       Laboratory tests, including DNA typing, were conducted on the physical evidence.  
14 Petitioner's blood type is AB and he is a secretor. Only 3 to 4 percent of the population have blood  
15 type AB and are secretors. Petitioner has had a vasectomy and, consequently, his semen is aspermic.  
16 Ms. C.'s blood type is O.

17       Ms. C.'s internal vaginal swabs did not disclose the presence of semen. However, the outer  
18 vaginal swabs tested positive for acid phosphatase, a substance that is present in semen. The swabs  
19 taken from the spot on the floor, the drip along the front of the examination table, and the step of the  
20 examination table all tested positive for two substances indicating that the material was semen. It  
21 was determined that the source of this semen was blood type AB and was a secretor. There were no  
22 sperm cells present in any of the samples. The specimens taken from the floor and from the  
23 examination table step also contained a DNA component that could have come from Ms. C. Swabs  
24 taken from the speculum contained aspermic semen and DNA that could have come from Ms. C.  
25 The tissue found in the wastebasket was smeared with aspermic semen and material containing DNA  
26 that could have come from Ms. C.

27       Pre-trial and Trial Proceedings

28       Prior to Petitioner's trial, the prosecution sought to exclude any testimony relating to the civil

1 lawsuit Ms. C. had filed against Petitioner. (CT 1184-85.) The trial court denied the motion to  
2 exclude all testimony relating to the civil suit, but limited any inquiry to the fact that the suit had  
3 been filed and that it sought monetary damages. The court did not allow questioning relating to the  
4 amount of damages sought by Ms. C. (RT 30-31.)

5 At Petitioner's trial, Dr. Frank Elliot testified as an expert gynecologist. If a patient were to  
6 come to him complaining of pain in the lower abdomen, he would palpate the abdomen with the  
7 patient lying flat on the table, not with her feet in the stirrups. He would then conduct an internal  
8 examination. First, a speculum would be inserted and specimens taken. A digital examination  
9 would then be conducted. The fingers do not push in and out in a thrusting motion. Unless an  
10 emergency arose, he would not touch a female patient until an attendant joined him, and he does not  
11 know of any practitioner who conducts unchaperoned pelvic exams in non-emergency situations.

12 Petitioner testified that he did not put his penis or any other object into Ms. C.'s vagina with  
13 the intent to arouse or gratify sexual impulses. Nothing occurred during the examination that  
14 aroused him. On the afternoon in question, the clinic was shorthanded and so he decided to conduct  
15 the examination alone. It would have been physically impossible for him to place his penis inside  
16 Ms. C. while standing on the floor. If he had tried to put his penis inside of her while standing on the  
17 step, he would have had to push the drape off her knees and bend down.

18 Petitioner further testified that, after he finished examining Ms. C., he went into examination  
19 room 3 and got some paper towels. He then went into his office, masturbated, and ejaculated into  
20 the paper towels. He placed the towels in the biohazard container. He did not put them in the roll-  
21 up and he did not know why he had told Lieutenant Hodgson that he had done so.

22 It was stipulated that Petitioner's penis is one and three-quarters inches long when flaccid and  
23 four inches long when fully erect. When Petitioner is flat footed, the distance from the base of his  
24 penis to the floor is 32 and 1/4 inches; when he stands on the balls of his feet it is 33 and 3/4 inches.  
25 Measurements of the height of the exam table varied from 31 and 1/8 inches to 34 inches, depending  
26 on the degree the padding was compressed.

27 During its deliberation, the jury sought clarification of a portion of the special instruction  
28 applicable to count two—rape with a foreign object. The jury's question was “if during exam [sic] his

1 intent changes from examination to sexual gratification, are we looking at unlawful intent[?]" (RT  
2 1049.) The trial court responded as follows:

3 The crime of unlawful penetration with a foreign object or with an unknown object  
4 requires penetration and a certain specific intent which is defined in your instructions.  
5 . . . This intent, that is, that specific intent, may be formed at any time, before or  
6 during the commission of the acts which constitute the physical aspect of the crime.  
Thus, if penetration is occurring and the requisite specific intent is present, and is or  
becomes the motivation for continued penetration, such penetration with specific  
intent would constitute the crime of unlawful penetration by a foreign object.

7 (RT 1049-50.)

8 The jury found Petitioner not guilty of rape, but guilty of rape with a foreign object. (RT  
9 1052-53.)

## 10 DISCUSSION

### 11 I. Jurisdiction

12 Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant  
13 to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of  
14 the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362,  
15 375 fn.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S.  
16 Constitution. In addition, the conviction challenged arises out of the Kern County Superior Court,  
17 which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 2241(d). Accordingly,  
18 the Court has jurisdiction over the action.

19 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
20 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment.  
21 Lindh v. Murphy, 521 U.S. 320 (1997), *cert. denied*, 522 U.S. 1008 (1997); Jeffries v. Wood, 114  
22 F.3d 1484, 1499 (9th Cir. 1997), *quoting Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*,  
23 520 U.S. 1107 (1997), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997)  
24 (holding AEDPA only applicable to cases filed after statute's enactment). The instant petition was  
25 filed after the enactment of the AEDPA; thus, it is governed by its provisions.

### 26 II. Legal Standard of Review

27 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody  
28 pursuant to the judgment of a State court only on the ground that he is in custody in violation of the

1 Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

2 The instant petition is reviewed under the provisions of the Antiterrorism and Effective Death  
3 Penalty Act which became effective on April 24, 1996. Lockyer v. Andrade, 538 U.S. 63, 70  
4 (2003). Under the AEDPA, an application for habeas corpus will not be granted unless the  
5 adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable  
6 application of, clearly established Federal law, as determined by the Supreme Court of the United  
7 States" or "resulted in a decision that was based on an unreasonable determination of the facts in  
8 light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d); see Lockyer,  
9 538 U.S. at 70-71; see Williams, 529 U.S. at 413.

10 As a threshold matter, this Court must "first decide what constitutes 'clearly established  
11 Federal law, as determined by the Supreme Court of the United States.'" Lockyer, 538 U.S. at 71,  
12 quoting 28 U.S.C. § 2254(d)(1). In ascertaining what is "clearly established Federal law," this Court  
13 must look to the "holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time  
14 of the relevant state-court decision." Id., quoting Williams, 592 U.S. at 412. "In other words, 'clearly  
15 established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by  
16 the Supreme Court at the time the state court renders its decision." Id.

17 Finally, this Court must consider whether the state court's decision was "contrary to, or  
18 involved an unreasonable application of, clearly established Federal law." Lockyer, 538 U.S. at 72,  
19 quoting 28 U.S.C. § 2254(d)(1). "Under the 'contrary to' clause, a federal habeas court may grant the  
20 writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a  
21 question of law or if the state court decides a case differently than [the] Court has on a set of  
22 materially indistinguishable facts." Williams, 529 U.S. at 413; see also Lockyer, 538 U.S. at 72.  
23 "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state  
24 court identifies the correct governing legal principle from [the] Court's decisions but unreasonably  
25 applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413.

26 "[A] federal court may not issue the writ simply because the court concludes in its  
27 independent judgment that the relevant state court decision applied clearly established federal law  
28 erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. A

1 federal habeas court making the “unreasonable application” inquiry should ask whether the state  
2 court’s application of clearly established federal law was “objectively unreasonable.” *Id.* at 409.

3 Petitioner has the burden of establishing that the decision of the state court is contrary to or  
4 involved an unreasonable application of United States Supreme Court precedent. *Baylor v. Estelle*,  
5 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the states,  
6 Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court  
7 decision is objectively unreasonable. See *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir.  
8 1999).

9 AEDPA requires that we give considerable deference to state court decisions. The state  
10 court's factual findings are presumed correct, 28 U.S.C. § 2254(e)(1), and we are bound by a state's  
11 interpretation of its own laws. *Souch v. Schaivo*, 289 F.3d 616, 621 (9th Cir. 2002), *cert. denied*, 537  
12 U.S. 859 (2002), *rehearing denied*, 537 U.S. 1149 (2003).

13 **III. Review of Petitioner's Claims**

14 **A. Ground One**

15 Petitioner contends that there is insufficient evidence to support his conviction for rape with a  
16 foreign object based on fraud in fact. Petitioner claims that the jury could have only found that he  
17 inserted his finger(s), a speculum, or swabs into Ms. C.’s vagina, as the possibility that it found he  
18 inserted his penis into Ms. C. was foreclosed by his acquittal on the rape charge and the substance of  
19 the jury’s question relating to the special instruction applicable to the rape with a foreign object  
20 count. Petitioner argues that, because Ms. C. had consented to the insertion of Petitioner’s fingers, a  
21 speculum, or swabs for purposes of the examination, any fraud perpetrated against her was fraud in  
22 the inducement rather than fraud in fact as required by section 289.

23 This claim was presented in an appeal to the Fifth DCA on July 18, 2000 and the judgment  
24 was affirmed in a reasoned opinion on December 10, 2001. (Answer, Exs. 2-3.) It was then raised  
25 in a petition to the California Supreme Court which summarily denied the petition. (Petition, Exs.  
26 C-D.) The California Supreme Court, by its “silent order” denying the petition, is presumed to have  
27 denied the claims presented for the same reasons stated in the opinion of the lower court. *Ylst v.*  
28 *Nunnemaker*, 501 U.S. 797, 803 (1991).

1        In rejecting Petitioner's claim, the Fifth DCA found that, despite the fact Petitioner was  
2    acquitted of rape, there was substantial evidence that he inserted his penis into Ms. C. in violation of  
3    section 289. The court noted that each count in the information had to be viewed independently and  
4    that Petitioner's acquittal on the rape count therefore had no bearing on determining what facts were  
5    found as to the count for rape with a foreign object. The court further found that the fraud in fact  
6    requirement was established based on the evidence that Petitioner unlawfully penetrated Ms. C. with  
7    his penis without her consent while pretending to conduct a gynecological examination.

8        In reviewing sufficiency of evidence claims, California courts expressly follow the Jackson  
9    standard articulated in Jackson v. Virginia, 443 U.S. 307 (1979); see People v. Johnson, 26 Cal.3d  
10   557, 575-578 (1980); see also People v. Thomas, 2 Cal.4th 489, 513 (1992). Pursuant to the  
11   Supreme Court's holding in Jackson, the test to determine whether a factual finding is fairly  
12   supported by the record is as follows:

13        [W]hether, after reviewing the evidence in the light most favorable to the prosecution,  
14    any rational trier of fact could have found the essential elements of the crime beyond  
  a reasonable doubt.

15    Jackson, 443 U.S. at 319; see also Lewis v. Jeffers, 497 U.S. 764, 781 (1990).

16        Sufficiency of evidence claims are judged by the elements defined by state law. Jackson, 443  
17    U.S. at 324, n.16. This Court must presume the correctness of the state court's factual findings. 28  
18    U.S.C. § 2254(e)(1); Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986). This presumption of  
19   correctness applies to state appellate determinations of fact as well as those of the state trial courts.  
20   Tinsley v. Borg, 895 F.2d 520, 525 (9th Cir. 1990). Although the presumption of correctness does  
21   not apply to state court determinations of legal questions or mixed questions of law and fact, the  
22   facts as found by the state court underlying those determinations are entitled to the presumption.  
23   Sumner v. Mata, 455 U.S. 539, 597 (1981).

24        Here, on December 3, 1997, the date of Petitioner's examination of Ms. C., Penal Code  
25   section 289(d) provided as follows:

26        Every person who causes the penetration, however slight, of the genital or anal  
27   openings of any person . . . for the purpose of sexual arousal, gratification, or abuse  
28   by any foreign object, substance, instrument, or device, or by any unknown object,  
  and the victim is at the time unconscious of the nature of the act and this is known to  
  the person committing the act or causing the act to be committed, shall be punished

1 by imprisonment in the state prison for three, six, or eight years. As used in this  
 2 subdivision, “unconscious of the nature of the act” means incapable of resisting  
 3 because the victim meets one of the following conditions:  
 4 (1) Was unconscious or asleep.  
 5 (2) Was not aware, knowing, perceiving, or cognizant that the act occurred.  
 6 (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics  
 7 of the act due to the perpetrator’s fraud in fact.

8 Cal. Penal Code § 289(d) (1997). Section 289(k) provided that “[u]nknown object’ shall include  
 9 any foreign object, substance, instrument, or device, or any part of the body, including a penis, when  
 10 it is not known whether penetration was by a penis or by a foreign object, substance, instrument, or  
 11 device, or by any other part of the body.” Cal. Penal Code § 289(k)(2) (1997).

12 The state court’s determination that there was sufficient evidence to support Petitioner’s  
 13 conviction for rape with a foreign object was not unreasonable. Ms. C. testified that Petitioner  
 14 inserted something that she was unable to identify into her vaginal cavity, that she felt thrusting  
 15 motions, that Petitioner was making motions like those made by men when they are having sexual  
 16 intercourse, that she felt fabric brush up against her leg, and that, after the object was removed, she  
 17 heard the sound of a zipper. (RT 84-86.) Further, the vaginal swabs and speculum tested positive  
 18 for a substance present in semen and the tissues that Ms. C. used to wipe herself with after the  
 19 examination contained aspermic semen. (RT 95, 180-81, 438-39, 444.) In each case, the semen  
 20 matched Petitioner’s blood type and secretor and fertility status. (RT 454, 551.) The semen stains  
 21 at the foot of the examination table were also consistent with Petitioner’s blood type and secretor  
 22 status and contained components that could have come from Ms. C. (RT 430-35.) This evidence  
 23 was sufficient for the jury to find that Petitioner penetrated Ms. C. for the purpose of sexual arousal  
 24 or gratification.

25 Further, there was sufficient evidence for the jury to conclude that the object inserted into  
 26 Ms. C. was an unknown object, as defined in Section 289(k)(2). Ms. C. testified that a sheet  
 27 obscured her view of Petitioner below the breastbone during the examination and that she told her  
 28 mother she was unsure what had been inserted and Nurse Harris testified that Ms. C. told her that she  
 was unsure what had been inserted. (RT 81-82, 140-41, 366-67.) There was also sufficient evidence  
 for the jury to find that Ms. C. was unaware of the essential characteristics of the act due to  
 Petitioner’s fraud in fact, as there was evidence that Petitioner inserted his penis into Ms. C. while

1 pretending to conduct a gynecological examination.

2 Petitioner's argument that his acquittal for rape forecloses the possibility that the jury found  
3 he committed an unlawful penetration with his penis does not compel a different result. The  
4 acquittal on the rape count has no impact on the sufficiency of the evidence supporting the  
5 conviction for rape with a foreign object. People v. Brown, 174 Cal.App.3d 762, 769 (1985) ("The  
6 statutory language of Penal Code section 954 means that each count of an information must stand  
7 upon its own merit and be weighed separately in its disposition; a verdict of either conviction or  
8 acquittal upon one count has no bearing upon the verdict with respect to another count."); see also  
9 U.S. v. Powell 469 U.S. 57, 61-69 (1984). Similarly, Petitioner's argument that the jury's inquiry  
10 regarding the special instruction shows that it did not convict him based on the unlawful penetration  
11 by his penis is purely speculative. The jury's inquiry does not foreclose the possibility that it found  
12 that Petitioner inserted his penis as the foreign object.

13 **B. Ground Two**

14 \_\_\_\_\_ Petitioner contends that, in response to the jury's inquiry relating to the special instruction,  
15 the trial court misinstructed it regarding the law applicable to the situation where a specific unlawful  
16 intent is formed only after an act has begun. Petitioner argues that the law applicable at the time of  
17 Ms. C.'s examination was that a violation of section 289 could not occur unless the unlawful intent  
18 was present when the act began.

19 This claim was presented in an appeal to the Fifth DCA on July 18, 2000 and the judgment  
20 was affirmed in a reasoned opinion on December 10, 2001. (Answer, Exs. 2-3.) It was then raised  
21 in a petition to the California Supreme Court which summarily denied the petition. (Petition, Exs.  
22 C-D.) The California Supreme Court, by its "silent order" denying the petition, is presumed to have  
23 denied the claims presented for the same reasons stated in the opinion of the lower court. Ylst v.  
24 Nunnemaker, 501 U.S. 797, 803 (1991).

25 In denying Petitioner's appeal, the Fifth DCA found that the primary case relied on by  
26 Petitioner, People v. Vela, 172 Cal.App.3d 237 (1985), was distinguishable because it dealt with a  
27 woman who initially consented to sexual intercourse, then withdrew consent during the act. In  
28 contrast, Ms. C. only consented to the insertion of Petitioner's fingers and medical instruments for

1 purposes of an examination, not the insertion of Petitioner's penis. The court further distinguished  
2 Vela finding that it dealt with withdrawn consent by the victim rather than a change in the  
3 perpetrator's intent. The Fifth DCA then found that, in any case, there was no prejudice to Petitioner  
4 because the trial court's answer to the jury's question was non-responsive and had no application to  
5 the evidence or theories presented by the parties.

6 This Court's review is limited to determining whether the state court unreasonably applied  
7 clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1); Delgado v. Lewis, 223 F.3d at 979-  
8 80. Admission of evidence and instructions of state law are a state law concern, not cognizable in  
9 federal habeas proceedings unless the state trial court's decision is error rising to the level of a due  
10 process violation. Estelle v. McGuire, 502 U.S. 62, 67 (1991). Constitutional Due Process requires  
11 that the State prove all elements of the offense charged and all facts necessary to establish each of  
12 those elements beyond a reasonable doubt. See Sullivan v. Louisiana, 508 U.S. 275, 277-78; U.S.  
13 Const., amends. V, VI, XIV. In evaluating jury instructions, the federal court looks to the context of  
14 the overall charge to the jury as a component of the entire trial process to determine whether the  
15 instructions in question so infected the entire trial process such that the resulting conviction violates  
16 due process rendering the trial fundamentally unfair. Id. at 72; see also United States v. Frazin, 780  
17 F.2d 1461, 1468 (9th Cir), *cert. denied* 479 U.S. 844 (1986).

18 The instruction in question did not so infect the trial process that the resulting conviction  
19 violated Petitioner's due process rights. In People v. Vela, the case on which Petitioner bases his  
20 argument that the instruction violated his due process rights, the California Court of Appeal held that  
21 a rape could not occur where a female initially consented to sexual intercourse, then subsequently  
22 withdrew the consent during the intercourse. People v. Vela, 172 Cal.App.3d 237, 242-44 (1985).  
23 Here, in contrast, it is undisputed that Ms. C. did not consent to sexual intercourse at any time prior  
24 to or during the examination. Further, the instruction at issue addressed only the shifting intent of  
25 Petitioner, not the withdraw of consent by Ms. C. Petitioner has therefore failed to show that the  
26 instruction in question violated his due process rights, as the holding in Vela was not applicable to  
27 the facts of his case.

28

1                   **C. Ground Three**

2                   Petitioner contends that his rights under the Confrontation Clause and his Sixth and  
3 Fourteenth Amendment rights to present defense evidence of significant value were violated when  
4 the trial court ruled that he could not cross-examine Ms. C. regarding the specific amount of  
5 damages she sought against him in a civil lawsuit. Petitioner argues that the amount of damages was  
6 relevant to show Ms. C.'s motive to lie about what had occurred during the gynecological  
7 examination.

8                   This claim was presented in an appeal to the Fifth DCA on July 18, 2000 and the judgment  
9 was affirmed in a reasoned opinion on December 10, 2001. (Answer, Exs. 2-3.) It was then raised  
10 in a petition to the California Supreme Court which summarily denied the petition. (Petition, Exs. C-  
11 D.) The California Supreme Court, by its "silent order" denying the petition, is presumed to have  
12 denied the claims presented for the same reasons stated in the opinion of the lower court. Ylst v.  
13 Nunnemaker, 501 U.S. 797, 803 (1991).

14                   In denying Petitioner's appeal, the Fifth DCA found that the trial court properly excluded the  
15 evidence, as the specific amount of damages sought had minimal probative value given the fact that  
16 Petitioner was permitted to question Ms. C. about the filing of the lawsuit. The Fifth DCA found  
17 that the trial court properly exercised its discretion in concluding that the relevance of the specific  
18 amount of damages being sought was outweighed by the potential for prejudice.

19                   "The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a  
20 criminal prosecution to be confronted with the witnesses against him. . . . Of particular relevance  
21 here, [w]e have recognized that the exposure of a witness'[s] motivation in testifying is a proper and  
22 important function of the constitutionally protected right of cross-examination. [Citation] It does not  
23 follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from  
24 imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On  
25 the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to  
26 impose reasonable limits on such cross-examination based on concerns about, among other things,  
27 harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is  
28 repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986)

1 (quotation marks omitted).

2        “Incorrect state court evidentiary rulings cannot serve as a basis for habeas relief unless  
3        federal constitutional rights are affected. [Citation] The state court’s decision to exclude certain  
4        evidence must be so prejudicial as to jeopardize the defendant’s due process rights. [Citation] To  
5        evaluate whether exclusion of evidence reaches constitutional proportions, we should consider five  
6        factors: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3)  
7        whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue  
8        or merely cumulative; and (5) whether it constitutes a major part of the attempted defense. [Citation]  
9        We must then balance the importance of the evidence against the state interest in exclusion.” Tinsley  
10      v. Borg, 895 F.2d 520, 530 (9th Cir. 1990).

11 The trial court's exclusion of the amount of damages sought in the civil lawsuit did not  
12 violate Petitioner's rights under the Confrontation Clause nor was it so prejudicial as to jeopardize  
13 Petitioner's due process rights. The court permitted Petitioner's counsel to question Ms. C. about the  
14 fact that the civil suit had been filed against Petitioner and counsel did so. (RT 30-31, 165-66.) The  
15 evidence of the amount of damages being sought was therefore merely cumulative, as the jury had  
16 sufficient information to consider Ms. C.'s motivation to fabricate the allegations against Petitioner  
17 for financial gain.

## RECOMMENDATION

19 Accordingly, the Court RECOMMENDS that the petition for writ of habeas corpus be  
20 DENIED WITH PREJUDICE and the Clerk of Court be DIRECTED to enter judgment for  
21 Respondent.

22 This Findings and Recommendation is submitted to the Honorable Lawrence J. O'Neill,  
23 United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule  
24 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of  
25 California. Within thirty (30) days after being served with a copy, any party may file written  
26 objections with the court and serve a copy on all parties. Such a document should be captioned  
27 "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall  
28 be served and filed within ten (10) court days (plus three days if served by mail) after service of the

1 objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §  
2 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may  
3 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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5 IT IS SO ORDERED.

6 **Dated: June 5, 2008**

/s/ John M. Dixon

7 UNITED STATES MAGISTRATE JUDGE

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